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Federal Communication Commission
Bureau Secretary

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, DC 20554

In the Matter of	)	
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Cellular Service and Other Commercial Mobile Radio Services in the Gulf of Mexico	)	WT Docket No. 97-112
	)	
	)	
Amendment of Part 22 of the Commission's Rules to Provide for Filing and Processing of Applications for Unserved Areas in the Cellular Service and to Modify Other Cellular Rules	)	CC Docket No. 90-6

To: The Commission

PETITION FOR PARTIAL RECONSIDERATION

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SUMMARY

Petroleum Communications, Inc. ("PetroCom") respectfully seeks reconsideration in part of the Report and Order released on January 15, 2002 in WT Docket No. 97-112 in the matter of cellular service rules for the Gulf of Mexico [hereinafter "*Gulf Cellular R&O*"]. Specifically, PetroCom seeks reconsideration of the Commission's decision to adopt the "two-formula approach" that permits land carriers to continue to use the land contour formula (32 dbu) for calculating contours that extend over water, while Gulf carriers are required to use the water contour formula (28 dbu). In the Second Further Notice of Proposed Rulemaking in this docket, the Commission reconsidered its earlier decision to use the "two-formula approach" and tentatively concluded that land carriers should use the same formula as Gulf carriers use to calculate over water contours. It did this in response to comments filed by the Gulf carriers that showed that land carriers should be required to use the water formula. At least half of the commenters that addressed this issue supported some type of "hybrid approach" that would require land and Gulf carriers to use the same formula for over water contours. In addition, the Gulf carriers submitted a study based on actual measurement data showing that land carriers have the stronger signal along the coastline. Further, PetroCom showed that "alternative propagation studies" filed by land carriers demonstrate that their actual service extends far beyond what is predicted by the land formula.

The *Gulf Cellular R&O* ignored all of the technical evidence that showed that land carriers have an unfair signal strength advantage in the Gulf over the Gulf carriers, evidence that supported the Commission's tentative conclusion to require Gulf and land carriers to use the same formula. It was thus error for the Commission to conclude that the two-formula approach was "adequate" to account for the different characteristics of signal propagation over land and water. In light of the evidence, it was also material error for the Commission to find that there was "little support" for a hybrid formula. The Commission's finding that it would be difficult to establish such a formula was also materially erroneous given that it is no more difficult than the approach the Commission decided upon in the *Gulf Cellular R&O*. It was also incorrect, as a matter of law, for the Commission to assume that the water formula was the rule in effect for Gulf carriers following the court remand of the Commission's previous rules. Also erroneous was the conclusion that the two-formula approach was justified in order to avoid upsetting existing agreements. Further, in adopting the two-formula approach, the Commission did not follow the requirements of the Regulatory Flexibility Act.

PetroCom also seeks reconsideration of the dismissals of its co-location applications filed pursuant to agreements with land carriers. The Commission should also clarify the new rules to make clear that a land carrier may not extend into any portion of the Gulf of Mexico Exclusive Zone, served or unserved, without the Gulf carrier's consent. Finally, the Commission should grandfather the operating parameters of facilities existing as of April 16, 1997, the start date of the rule making.

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To: The Commission

PETITION FOR PARTIAL RECONSIDERATION

Petroleum Communications, Inc. ("PetroCom"), by its attorneys and pursuant to Section 1.106 of the Commission's Rules, 47 C.F.R. §1.106, hereby requests reconsideration in part of the *Gulf Cellular R&O* released on January 15, 2002 in the captioned dockets.[1] PetroCom seeks reconsideration of the Commission's decision to use a "two-formula" approach, requiring Gulf carriers to use the 28 dbu "water formula" while permitting land carriers to use the 32 dbu "land formula" for calculating contours for cellular systems operating at the boundary separating the Gulf of Mexico Service Area and land markets. PetroCom also seeks reconsideration of the dismissal of its co-location applications filed pursuant to agreements with land carriers. It also seeks clarification of the new rule creating the "Gulf of Mexico Exclusive Zone." PetroCom further requests the Commission to reconsider the *Gulf Cellular R&O* and grandfather the

[1] Cellular Service and Other Commercial Mobile Radio Services in the Gulf of Mexico; Amendment of Part 22 of the Commission's Rules to Provide for Filing and Processing of Applications for Unserved Areas in the Cellular Service and to Modify Other Cellular Rules, Report and Order, 67 Fed. Reg. 9596 (March 4, 2002) [hereinafter "*Gulf Cellular R&O*"].

operating parameters of facilities in and near the Gulf that existed as of April 16, 1997, the start date of the rule making.

BACKGROUND

On April 16, 1997, the Commission released its *Second Further Notice* in the captioned dockets, proposing new cellular service rules for the Gulf of Mexico Service Area ("GMSA").[2] The Commission proposed creating a 12-nautical mile Coastal Zone, spanning the entire Gulf coastline, in which Phase II procedures for licensing cellular unserved areas would apply. Beyond the proposed Coastal Zone there would be an Exclusive Zone in which the two Gulf carriers (PetroCom and Bachow/Coastel, L.L.C.) would enjoy exclusive rights.[3]

The *Second Further Notice* addressed a number of related issues, including the propagation formulas used to determine coverage in the Gulf. The Commission stated:[4]

> Another issue that has received repeated attention is the calculation of service contours that extend partially over water and partially over land. Our goal throughout the *Unserved Area* proceeding has been to adopt formulas for calculating SABs that reflect reliable service coverage. In the *Unserved Area Third Report and Order* [7 FCC Rcd. At 7184], we adopted a GMSA formula based on measurement data submitted by PetroCom, because the formula takes into consideration the propagation characteristics over water and, therefore, we believe more accurately represents coverage in the Gulf. For purposes of administrative efficiency, however, we declined to use the water-based formula to determine coverage by land-based systems with contours that extend partially over water. Similarly, we determined that it would be simpler to use the water-based formula to measure coverage from Gulf-carrier transmitters, even if such contours extend partially over land. The Gulf carriers maintain, however, that it is inaccurate to measure a contour that extends over water by the land-based formula, simply because the transmitter is owned and operated by a land-based carrier. They argue that, to do so, underestimates the actual size of the extension, because signals are attenuated less over water.

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[2] Cellular Service and Other Commercial Mobile Radio Services in the Gulf of Mexico, Amendment of Part 22 of the Commission's Rules to Provide for Filing and Processing of Applications for Unserved Areas in the Cellular Service and to Modify Other Cellular Rules, WT Docket No. 97-112 and CC Docket No. 90-6, *Second Further Notice of Proposed Rule Making*, 12 FCC Rcd 4578 (1997)[hereinafter "*Second Further Notice*"].

[3] *Id.* at ¶¶29-35.

[4] *Id.* at ¶37 (footnotes omitted).

The Commission noted the previous comments filed by Bachow/Coastel's predecessor-in-interest (RVC Services) and PetroCom in support of this position.[5] The Commission's *Second Further Notice* also observed:[6]

> Because the Coastal Zone would be a unique "hybrid" area that is capable of receiving service from either a land-based or water-based carrier, we tentatively conclude that the same formula should apply to all contours within the Coastal Zone, regardless of whether the transmitter is owned and operated by a land-based carrier or water-based carrier. We therefore reconsider our earlier decision in the *Unserved Area Third Report and Order* and seek comment on whether a hybrid formula should be adopted for determining reliable coverage for signals that extend partially over water and partially over land as occurs in the coastal areas of the Gulf of Mexico. In particular, we request commenters to submit specific formulas that would adequately reflect the reliable service area of such combination land-water transmitters. We also seek comment on whether it would be more appropriate to employ a case-by-case approach, using the GMSA formula as a starting point. We invite discussion on these alternatives and on other methods that could be used to calculate such contours.

Numerous parties commented on the contour formula issue in response to the *Second Further Notice*. PetroCom observed that a land formula contour (32 dbu) gave land carriers a signal strength advantage wherever it is adjacent to a water formula contour (28 dbu), resulting in the land carrier capturing the Gulf carrier's traffic. PetroCom observed that land carriers in markets bordering the GMSA were already using alternative propagation showings to obtain protection for service areas that approximate those derived from the water formula. Accordingly, PetroCom proposed that, for any cell site within 35 miles of the coastline, the land carrier should be required to analyze its Service Area Boundary ("SAB") along eight cardinal radials using the water formula. Those portions of the SAB not extending into the GMSA could be recalculated using the land formula. Carriers that believed terrain factors would prevent a

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[5] *Id.* at n. 73.

[6] *Second Further Notice*, at ¶38 (footnotes omitted).

water formula contour from intruding into the GMSA could make an engineering showing to support allowing such facilities.[7]

In its reply comments, Bachow/Coastel opposed creating any "new" hybrid formula, but agreed with PetroCom's proposal to apply the water formula to the over water contours of land carriers.[8] It quoted an engineering report prepared by Tom L. Dennis, who concluded: "It is clearly inappropriate to apply the land-based propagation formula to all radials of land-based stations located within 35 miles of the shoreline."[9] Mr. Dennis, a professional engineer with more than 40 years of experience with communications hardware and system design, including propagation analysis, stated:[10]

> The land-based carriers have obtained coverage in portions of the GMSA by de minimis extensions and by the change in contour calculation from the Carey 39 dBu contour (defined in FCC report R-6406) to the newer 32 dBu contour. Due to differences in the land and Gulf propagation formulas, the "best server line," where equal signal strengths exist from two carriers, has been forced as much as 20 kilometers offshore. As a result, the Gulf carrier's customers in the area between the best server line and the coastline cannot receive reliable service from the Gulf Carrier. Instead, these customers experience substantial interference from the signal of land-based carriers that "overpowers" the signal from the Gulf carrier, thereby reducing reliable service from the Gulf carrier. These customers would be served by the Gulf carrier, absent the land-based carrier's signal, because the Gulf carrier's propagation contours extend to the shore and would serve this area in the Gulf quite adequately if not "overpowered" by the land-based carrier's existing sites. This area of the GMSA, which is currently within the cellular geographic service area ("CGSA") of the Gulf carriers, could be served by the Gulf carriers if an equitable solution can be identified.

Mr. Dennis explained, in detail, why the land formula gives land carriers such a signal strength advantage over the Gulf carriers. He showed that the land formula assumes a receive antenna

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[7] Comments of Petroleum Communications, Inc., filed June 2, 1997, at pp. 9-11.

[8] Reply Comments of Bachow/Coastel, L.L.C., August 4, 1997, pp. 19, 32-34.

[9] *Id.* at p. 33.

[10] *Id.* (Engineering Report of Tom L. Dennis, PE, p. 3).

height of 6 feet, whereas the water formula assumes a receive antenna height of 32 feet.[11] He stated that the original signal strength measurements used to develop the land formula were made at 32 feet, but were adjusted by a 9 dB correction factor to reflect a receive antenna height of 6 feet.[12]

Mr. Dennis concluded, "[t]his 9 dB difference equates to approximately 8 kilometers of additional coverage that a land carrier presently has into the Gulf."[13] He also concluded that, because of the characteristics of the terrain bordering the Gulf, the 14 dB terrain factor used in the land formula to account for signal blockage and attenuation by trees and buildings was not appropriate in calculating SABs of cell sites with coverage over the Gulf.[14] He stated, "Therefore, all radials (calculated every 10 degrees) from a land-based carrier's transmitter that are located within 35 miles of the shoreline should be recalculated using the water formula and the coverage area re-plotted for the over-water portion. This will more realistically predict the coverage of the land-based carriers over water."[15]

Other parties supported the proposal to require land and Gulf carriers to use the same formula for over water contours. Radiofone, Inc., for example, proposed a hybrid formula with details on how it could work.[16] Southwestern Bell Mobile Systems, Inc. stated that the same formula should be used for measuring contours extending into the Coastal Zone and for unserved area applications, stating that the water formula, or a hybrid which "splits-the-difference"

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[11] *Id.* at p. 5.

[12] *Id.*

[13] *Id.*

[14] *Id.*

[15] *Id.*, p. 6.

[16] Comments of Radiofone, Inc., filed June 2, 1997, at pp. 5-6.

between equations for land and water contour calculations, was acceptable.[17] Southwestern Bell's engineer stated that "although the size of the contour is of little consequence *except where it can be used to define CGSA*, a 'split-the-difference' equation is fair to all concerned and is acceptable."[18] He further observed:[19]

> Although the propagation of cellular signals is attenuated less over water that [sic] over land...*and thus would seem to create an advantage to a land-based cell extending out over water vis-à-vis a water-based cell extending over land,* realistically, this issue is eliminated by the creation of a "Coastal Zone" and *the use of the same 32 dBu equation* by both land-based and water-based licensees.

Southwestern Bell thus concluded: "The same formula should be used since coverage will have essentially the same propagation characteristics."[20] GTE Service Corporation agreed "that all contours primarily serving Gulf waters should be calculated in the same manner."[21] It supported a hybrid-type approach that used the water formula for calculating contours extending into the Gulf.[22]

Other land carriers opposed the hybrid approach. Vanguard Cellular Systems, Inc. supported retaining the 32 dbu formula for land sites regardless if their contours extended over water, stating that a hybrid approach would be burdensome to implement and its engineers did "not believe a 'hybrid' contour measurement is currently available that would allow

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[17] Comments of Southwestern Bell Mobile Systems, Inc., June 2, 1997, Affidavit of LeRoy A. Adam, p. 4.

[18] *Id.* (emphasis added). This observation is important, because the Commission ultimately decided *not* to use SAB contours to define the Gulf Carriers' protected service areas, meaning that SAB contours have lost the relevance they had in the *Second Further Notice*, i.e., to define existing CGSAs and identify unserved areas available for Phase II processing.

[19] *Id.* at p. 5 (emphasis added).

[20] Comments of Southwestern Bell Mobile Systems, Inc., June 2, 1997, p. 5 (emphasis in original).

[21] Comments of GTE Service Corporation, June 2, 1997, at p. 12-13.

[22] *Id.* at p. 13.

simultaneous plotting of the entire SAB contour."[23] AT&T Wireless opposed the hybrid formula, stating that it would be unnecessary *if* the Commission adopted its proposal to incorporate the Coastal Zone into the licensed territories of the land carriers' markets.[24] It also asserted that there would be "administrative complexity associated with the creation of a 'hybrid' formula."[25] Palmer Wireless, Inc. opposed the hybrid formula, asserting that "[a]pplication of a water formula to a transmitter which is situated on land, even though resulting in an extension over water, would not produce reliable predicted contours."[26]

360° Communications Company also opposed a hybrid formula, asserting that it would be "difficult and resource-intensive for licensees to calculate" and "impossible for the agency to monitor and regulate" with "no countervailing benefit [...]."[27] 360° relied on its engineer's statement to support these assertions. However, the engineer's statement devoted to "Propagation Formulas" began merely by asking questions about how a hybrid formula would work, followed by the observation that it "would have to determine where the land/water boundaries exist."[28] The engineer stated that the "only way" to do this was by using "digital topography data" that he described was "extremely expensive and thus would impose an undue burden upon carriers required to use the hybrid formula."[29] The engineer, however, never stated

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[23] Comments of Vanguard Cellular Systems, Inc., June 2, 1997, at pp. 5-6 and "Declaration of Terry Brady." However, Mr. Brady's statement did not address the hybrid formula approach.

[24] Comments of AT&T Wireless Services, Inc., June 2, 1997, at p. 10.

[25] *Id.* The statement from its engineer did not support this claim. He simply asserted that a hybrid formula would require AT&T to redesign "Gulf-bordering sites" and that "would be burdensome at best and economically detrimental at worst." *Id.*, at Declaration of John A. Dapper, ¶12.

[26] Comments of Palmer Wireless, Inc., June 2, 1997, at p. 11. Although Palmer suggested technical reasons for why this was so, it supported none of them with expert knowledge.

[27] Comments of 360° Communications Company, June 2, 1997, at p. 7.

[28] *Id.*, at Declaration of James V. Stewart, p. 3.

[29] *Id.*

that a hybrid formula could not work, nor did his statement support the assertion that it would be "impossible" for the agency to implement. Nor did he specifically quantify in any manner how "extremely expensive" he thought a hybrid formula would be. Several other land carriers that supported a hybrid formula approach never found this to be a problem.

360°, Alltel, Southwestern Bell and Vanguard did not speak to the contour formula issue in reply comments filed on August 4, 1997. AT&T limited its reply comments on the issue to stating that the Commission "should not create an entirely new formula for measuring reliable coverage contours."[30] In its reply comments, Texas RSA 20B2 Limited Partnership ("Texas RSA LP") opposed the hybrid formula proposed by PetroCom, citing the comments of AT&T, 360° and Coastel that opposed a hybrid formula. Texas RSA argued that if a hybrid formula was adopted, it should not be applied retroactively, but only prospectively.[31]

Reply comments filed by Palmer continued to oppose the hybrid formula. It argued that the discussion to date had been "based upon the false premise that signals from land-based transmitters extending over the Gulf at minimum threshold strengths will be 'useable.'"[32] Palmer observed that it "experienced excessive interference beginning approximately 20 miles perpendicular to the Ft. Myers, FL shore, although its engineer received sufficient signal strength measurements beyond that point."[33] It asserted that a hybrid formula would be difficult to administer.[34] Yet Palmer never specifically challenged Mr. Dennis' conclusion that land carriers capture Gulf carrier traffic by using the land formula for over water contours. Instead, by

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[30] Reply comments of AT&T Wireless Services, Inc., August 4, 1997, at p. 10.

[31] Comments of Texas RSA 20B2 Limited Partnership, June 2, 1997, at pp. 5-6.

[32] Reply Comments of Palmer Wireless, Inc., August 4, 1997, p. 4.

[33] *Id.*, citing "Declaration of James E. Fredrickson."

[34] *Id.*

recognizing that its Ft. Myers site provides reliable coverage approximately 20 miles off shore, Palmer seemed to corroborate Mr. Dennis' conclusion.

PetroCom's reply comments addressed the opponents to the hybrid formula. It observed that AT&T's position -- that a hybrid formula would require a power decrease for Gulf-bordering sites -- supported that such sites were capturing traffic that belonged to the Gulf carrier.[35] PetroCom showed that a hybrid approach was essential to correct the unfair signal strength advantage the land formula gives to land carriers for over water contours adjacent to Gulf carrier contours, otherwise the water formula for Gulf carriers was useless. PetroCom showed that this approach would not be complex, submitting a statement from its engineering consultant demonstrating how it could be implemented.[36]

In response to 360˚, PetroCom stated that standard 30 second terrain data would work fine with a hybrid approach, the use of which would eliminate most of the subscriber capture problems land and Gulf carriers experience at the boundary.[37] PetroCom also stated:[38]

> [Texas RSA LP's] alternative propagation showing highlights the problem: land-based carriers, pursuant to Section 22.911(b), can demonstrate that their signals actually go further over water than what is predicted by the 32 dbu formula contained in Section 22.911(a), thus permitting the land-based carrier to capture traffic within the Gulf carrier's CGSA as would be defined by the GMSA formula contained in 22.911(c). The only way of rectifying the unfair advantage that land-based carriers enjoy is to subject their contours to the same hybrid propagation formula used by GMSA licensees. Once that is accomplished, CGSAs can be redefined and Phase II licensing commenced at the appropriate time.

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[35] Reply comments of Petroleum Communications, Inc., August 4, 1997, pp. 3-4.

[36] *Id.* at pp. 4-5; and Declaration of James J. Keller. The "hybrid formula" PetroCom proposed was not a new formula that averaged the existing formulas. Rather, it required land carriers to use a hybrid approach in applying the land and water formulas, and use the water formula for over water contours.

[37] *Id.* at p. 16.

[38] Reply comments of PetroCom, filed August 4, 1997, pp. 20-21(footnote omitted).

In the footnote PetroCom repeated that, under its proposal, a land carrier could submit an engineering showing that terrain factors prevented a contour derived from the water formula from intruding into the GMSA, and that the proposed facilities should thus be permitted.[39]

The whole point of the discussion concerning the "hybrid formula" centered on the Commission's reconsideration of its earlier decision not to use one, and its tentative conclusion that the same formula should be applied to over water contours regardless of their source. Throughout this proceeding the Gulf carriers focused on the problem of their subscriber traffic being captured by the land carriers' stronger signals due to the land formula. Their showings included alternative propagation studies filed by land carriers indicating coverage of Gulf waters far beyond what is predicted by the land formula, and engineering studies that showed the solution to this problem is for land and Gulf carriers to use the same formula.[40]

In November, 1997, a group of land carriers met with the Commission staff. They presented a computer model of signal coverage for the coastal area near Galveston, Texas that they claimed proved that Gulf carriers were capturing land carrier traffic.[41] With a new study prepared by Mr. Dennis based on actual measurement data, the Gulf carriers demonstrated that the land carriers had the stronger signal strength for capturing Gulf carrier traffic, not vice versa.[42] None of the land carriers except Alltel (years later, in 2001) took exception with the Dennis Study.

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[39] Such an approach is similar to the "alternative propagation showing" that land carriers use to show that actual service contours extend beyond what the land formula predicts. Here, they would be showing the converse, i.e., that terrain prevents their signals from extending into the Gulf. It is hard to see how such a showing could be "difficult" or "impossible" given the ease with which land carriers make "alternative propagation showings" under existing rules.

[40] *See, e.g.*, PetroCom reply comments, filed August 4, 1997, p. 3, Attachment A (Declaration of James J. Keller); Ex parte letter from PetroCom counsel to FCC Secretary, filed October 7, 1997; Ex parte letter from PetroCom counsel to FCC Secretary, filed January 22, 1998 (Exhibit 1).

[41] Ex parte letter from GTE counsel to FCC Secretary, filed November 18, 1997.

[42] Ex parte letter from PetroCom counsel to FCC Secretary, filed January 22, 1998 (Exhibit 2).

In light of the uncontroverted evidence in this proceeding that the land formula gave land carriers an unfair signal strength advantage in coastal areas vis-à-vis the Gulf carriers, the only real issue became how it should have been remedied. In 1997, PetroCom proposed that the water formula should apply to such contours, a position supported by other commenters as described above. In 1998, PetroCom and Coastel jointly proposed the alternative of maintaining CGSA definitions for land and Gulf carriers in accordance with the land and water formulas, respectively, while permitting the Gulf carriers to operate with signal strengths at the coastline boundary using the land formula, i.e., the same formula used by land carriers.[43] In 1999, the joint proposal of PetroCom and U.S. Cellular called for permitting both land and Gulf carriers to operate with signal strengths using the land formula, while extending the land carriers' service territories 10 miles seaward on the Florida side of the Gulf only.[44] In 2000, their proposal was revised to provide a process by which either a land carrier or a Gulf carrier could equalize its signal strength at the coastline boundary, based on measurement data, without consent of the other carrier.[45] These proposals thus presented the alternative of having both land and Gulf carriers use the land formula instead of the water formula.

In May 2000, Alltel filed further comments proposing a 12-nautical mile "Neutral" Coastal Zone that both land and Gulf carriers could serve and where neither type of carrier would receive interference protection.[46] Several other land carriers supported the Neutral Zone proposal, claiming that the current rules "jeopardized" land-based service in coastal areas.[47] The

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[43] Ex parte letter from PetroCom counsel to FCC Secretary, filed June 3, 1998.

[44] Ex parte letter from PetroCom counsel to FCC Secretary, filed May 18, 1999.

[45] Ex parte letter from PetroCom counsel to FCC Secretary, filed January 11, 2000.

[46] Further Comments of Alltel Corporation, filed May 15, 2000, pp. 9-10.

[47] *See, e.g.,* Joint reply comments of Alltel, BellSouth Corporation, SBC Wireless, Inc. and Telepak, Inc., filed May 30, 2000; Ex parte letter from Alltel counsel to FCC Secretary, filed July 6, 2000. The Neutral Zone proposal

record in the proceeding, however, provided scant evidence for any of the problems claimed by the land carriers, including claims of being unable to serve customers due to weak signals and having subscriber traffic captured by the Gulf carriers.[48] Alltel later dropped the Neutral Zone proposal after reaching a settlement with Bachow/Coastel over service to the Mobile Bay, Alabama area, and agreeing to co-locate facilities there.[49]

In light of the agreement reached by Alltel and Bachow/Coastel, the PetroCom/U.S. Cellular proposal was revised. Originally, it proposed a method that allowed a land or Gulf carrier to equalize signal strength based on measurement data without the other carrier's consent. The revision eliminated this provision, while retaining the provision allowing both types of carriers to use the same formula, i.e., the land formula, for calculating contours.[50]

Based on the record summarized above, the *Gulf Cellular R&O* addressed the contour formula issue as follows:[51]

> We will continue to use the two existing SAB formulas for land and water-based sites, respectively. While no mathematical formula can precisely duplicate actual signal propagation in all circumstances, we conclude that the two-formula approach adequately accounts for the different characteristics of signal propagation over land and water. In addition, the record reflects little support for a hybrid formula, and we find that it would be difficult to establish such a formula that would account for the variation in propagation of a single signal over both land and water. Finally, retaining the existing SAB formulas

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subsequently specified that land and Gulf carriers would both use the land (32 dbu) formula for calculating contours in the Neutral Zone. *See* Ex parte letter from Alltel counsel to FCC Secretary, filed December 8, 2000.

[48] *See* Ex parte letter from PetroCom counsel to FCC Secretary, filed January 10, 2001 (Attachment 1, Summary of Record Evidence). Alltel made a further submission in support of the Neutral Zone that repeated the land carriers' claims and included an engineering study. Ex parte letter from Alltel counsel to FCC Secretary, filed February 27, 2001. PetroCom's response showed that the factual record supported none of these claims and that the engineering study, lacking any real world data to support it, was flawed. PetroCom ex parte letter to FCC Secretary, filed April 27, 2001.

[49] Joint Request of Bachow/Coastel, L.L.C. and Alltel Communications, Inc., filed August 10, 2001, p. 2 (parties requesting the Commission to conclude rule making without adopting rule changes for portions of the Gulf subject to their co-location agreement).

[50] Ex Parte Submission Of Revised Proposal As Alternative To Proposed Rules Pursuant To The Regulatory Flexibility Act, filed August 21, 2001.

[51] *Gulf Cellular R&O*, ¶36.

> is consistent with our overall decision to maintain the existing relationship between land and Gulf carriers in the Western Gulf as the basis for negotiated solution of their operational conflicts. The Gulf carriers have been using the water formula to depict SAB contours for their facilities operating in the Gulf since the formula was adopted, while the land carriers have used the land-based formula for their facilities. Consequently, changing the SAB definitions at this point could lead to one side or the other unilaterally increasing their transmitter power under the revised definitions, which could upset existing agreements and create new conflicts. Of course, this does not preclude parties from entering into voluntary agreements that would allow for consensual transmitter power adjustments based on alternative contour definitions.

THE COMMISSION SHOULD RECONSIDER THE DECISION THAT ADOPTED THE TWO-FORMULA APPROACH AND REQUIRE THE USE OF THE SAME FORMULA FOR OVER WATER CONTOURS

PetroCom respectfully submits that the decision to adopt the "two-formula approach" is based on material errors and omissions. The Commission should reconsider that decision and adopt the PetroCom/U.S. Cellular proposal permitting all carriers to use the land formula for over water contours. Alternatively, the Commission should require land carriers to use the water formula for their over water contours.

In particular, it was erroneous to find that: (1) the two-formula approach adequately accounts for the different characteristics of signal propagation over land and water; (2) the record reflects little support for a hybrid formula; and (3) it would be difficult to establish such a formula. It was erroneous to base the conclusion to use the two-formula approach on: (1) being consistent with the overall decision to maintain the existing relationship between land and Gulf carriers in the Western Gulf as the basis for negotiated solution of their operational conflicts; (2) the Gulf carriers using the water formula since it was adopted; and (3) wanting to avoid allowing one side or the other to increase power and possibly upsetting existing agreements. It was further error to not analyze the PetroCom/U.S. Cellular proposal to allow Gulf and land carriers to both use the 32 dbu land formula.

The Commission's decision to reconsider its earlier decision, and tentatively conclude that the same formula should apply to land and Gulf carriers' over water contours, was based on comments previously submitted by the Gulf carriers showing that the land formula gave land carriers an unfair signal strength advantage in the Gulf and, therefore, that the water formula should apply to their over water contours.[52] The Commission's statement in the *Second Further Notice* thus acknowledged that the current two-formula approach *did not* adequately account for the different characteristics of signal propagation over land and water. The Gulf carriers' concerns were well founded. The Dennis Study, based on actual measurement data refuted weakly by only one party, Alltel, in support of a proposal it later dropped, demonstrates that the land formula gives land carriers a significant signal strength advantage over Gulf carriers. The Gulf carriers demonstrated that the studies submitted by the land carriers in support for their claims were all theoretical and flawed. It was erroneous to ignore the factual record in this proceeding and the studies submitted by the parties in finding that the two-formula approach is "adequate."

Conclusions reached on an issue as technical as propagation formulas require a reasoned justification based on a careful review of the record evidence, including competing technical reports and studies. *AT&T Wireless Services, Inc., et al. v. FCC,* 270 F3d 959, 968 (D.C. Cir. 2001). In *AT&T*, the court of appeals for the D.C. Circuit found that the Commission had not explained why it chose one interference threshold over another as being "more realistic" in assessing competing studies on the issue of whether airborne cellular equipment would cause interference to terrestrial systems. Rather, the agency simply stated that one study had relied on "unrealistic assumptions" without providing a reasoned justification for why the assumption of the other study was "more realistic." The court stated:

[52] *Second Further Notice*, ¶37.

> Conclusory explanations for matters involving a central factual dispute where there is considerable evidence in conflict do not suffice to meet the deferential standards of our review. Basic principles of administrative law require the agency to "examine the relevant data and articulate a satisfactory explanation for its action including a rational connection between the facts found and the choice made." [internal citation omitted].

Id. Here, the *Gulf Cellular R&O* includes not one sentence examining the technical studies dealing with the contour formula issue. It simply ignores them though the Commission specifically requested such information. There is no rational connection between the facts and the choice it made, requiring the Commission to reconsider its decision. *Motor Vehicles Manufacturers Association v. State Farm Mutual Automobile Insurance Company*, 463 U.S. 29, 43 (1982)(Court found Government's rulemaking analysis "nonexistent").

It was likewise error to find that the record reflects "little support" for a hybrid formula, an approach that would require both types of carriers to use the same formula for over water contours. Five carriers, representing half of the parties whose initial comments addressed the issue, supported such a proposal, at least equal to the number who opposed it. More important than the number of commenters supporting the proposal, however, is the factual support they submitted for their position. That support included the Dennis studies that were based on actual measurement data, the alternative propagation studies filed by land carriers demonstrating large extensions of reliable service contours in Gulf waters, and the testimony of engineering experts. The conclusion that there was "little support" for the hybrid approach was plain error.

Finding it would be difficult to establish such a formula was also erroneous. It, too, has no rational connection to the facts. At least five carriers found nothing particularly difficult with having land and Gulf carriers using the same formula for over water contours, and found that fairness required it. Two commenters, PetroCom and Radiofone, showed specifically how it could be done with no difficulty at all. Those opposed to this approach relied on conclusory

statements. It was error for the Commission to adopt those conclusory statements, without explanation, after rejecting its earlier decision not to take a hybrid approach, a decision based on "administrative efficiency." A hybrid approach that requires land and Gulf carriers to both use the same formula for over water contours (28 or 32 dbu) is no more difficult than the approach the Commission decided upon in the *Gulf Cellular R&O.*

The *Gulf Cellular R&O* did not claim that "administrative efficiency" supported the decision to use the two-formula approach. Instead, the Commission concluded that its decision was "consistent" with its "overall decision" to maintain existing relationships between carriers as a basis for their negotiations over conflicts. This, too, was error. Existing relationships between carriers – extension and co-location agreements – are based upon the principle that the parties should use the same 32 dbu land formula for their respective contours. In adopting rules intended to resolve conflict, it is irrational to adopt rules that will inevitably cause conflict by giving land carriers a significant negotiating advantage over Gulf carriers. It is irrational to do so even if it may be "consistent" with any other part of the Commission's decision.

In support of using the two-formula approach, the Commission stated that the Gulf carriers have been using the water formula since it was adopted. This conclusion, in the first instance, is based on the false premise that the water formula has been in force ever since it was adopted. The rules remanded by the D.C. Circuit court of appeals defined Gulf Carriers' CGSAs in terms of SAB contours as calculated by the water formula contained in Section 22.911(a)(2). The water formula was adopted in the Commission's *Third Report and Order* in Docket 90-6.[53] The appeals court in 1994 vacated and remanded the *Third Report and Order* in its entirety.[54]

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[53] *See* Amendment of Part 22 of the Commission's rules to provide for filing and processing of applications for unserved areas in the Cellular Service and to modify other cellular rules, Third Report and Order and Memorandum Opinion and Order on Reconsideration, 7 FCC Rcd 7183 (1992)[hereinafter "*Third Report and Order*"].

[54] *Petroleum Comms., Inc. v. FCC*, 22 F.3d 1165 (D.C. Cir. 1994).

The appeals court in 1994 vacated and remanded the *Third Report and Order* in its entirety.[54] The court did not vacate the *Third Report and Order* in part by preserving the water formula. Rather, the court did the logical thing: it vacated and remanded the entire order that included the rule that defined Gulf carriers' CGSAs by SAB contours and the contour formula used for that purpose. In response, consistent with the court's decision, the Commission adopted a Note to Section 22.911(a):[55]

> NOTE: On May 13, 1994, the United States Court of Appeals for the District of Columbia Circuit instructed the FCC to vacate the provisions of old §22.903(a), now §22.911(a), insofar as they apply to cellular systems licensed to serve the Gulf of Mexico MSA (GMSA), pending reconsideration of an issue remanded to the FCC in that decision. See Petroleum Communications, Inc. v. Federal Communications Commission, No. 92-1670 and RVC Services, Inc., D/B/A Coastel Communications Company v. Federal Communications, No. 93-1016, ___ F2d ___, ___ (DC Cir. 1994). Accordingly, notwithstanding the provisions of §22.911(a), until further notice, the authorized CGSAs of the cellular systems licensed to serve the GMSA are those which were authorized prior to January 11, 1993.

That the second sentence of the Note speaks to "authorized CGSAs" without specific reference to the contour formula rule does not alter the fact that the *Third Report and Order* was vacated and remanded in its entirety as acknowledged in the first sentence of the Note. The status quo rules, i.e., those existing prior to the January 11, 1993 effective date of the *Third Report and Order*, gave the Gulf carriers the right to have a 39 dbu signal strength at the coastline boundary.[56]

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[54] *Petroleum Comms., Inc. v. FCC*, 22 F.3d 1165 (D.C. Cir. 1994).

[55] 47 C.F.R. §22.911(a) (1995).

[56] The Commission's decision to replace the 39 dbu signal strength rule with a 32 dbu signal strength rule applied only to land-based carriers when it was adopted. At that time, the Commission decided it would deal with Gulf carriers separately, leading to the *Third Report and Order*. *See* Amendment of Part 22 of the Commission's rules to provide for filing and processing of applications for unserved areas in the Cellular Service and to modify other cellular rules, *Second Report and Order*, 7 FCC Rcd 2449 at ¶13 (1992). Once the *Third Report and Order* was vacated and remanded, the only signal strength rule currently applicable to Gulf carriers as a matter of law was the 39 dbu rule, i.e., the rule that existed as of January 11, 1993.

It was simply incorrect, as a matter of law, to assume that the water formula was the rule in effect following the court's remand.[57] PetroCom opposed the Commission's proposal to define its CGSA in terms of its SAB contours in the first place, and persuaded the court to vacate Section 22.911(a) as it applied to the Gulf carriers. PetroCom's argument came down to this: if the Commission was going to use SAB contours to define Gulf carriers' CGSAs, then it should use a water formula, thus expanding the footprint of PetroCom's SABs to protect its territory. Now that the water formula no longer serves as a method for defining SAB contours and, in turn, the Gulf carrier's CGSA under Phase II licensing procedures, its *raison d'etre* is gone. What is only relevant now is whether Gulf carriers should be allowed to operate in the GMEZ, where they are supposed to have exclusive rights, with the same signal strength at the market boundary that adjacent land carriers enjoy. It was error to hold that they should not because they have been using the water formula "since it was adopted," especially when that formula was not even in force.

Also erroneous was the conclusion that the two-formula approach was justified by wanting to avoid allowing one side or the other to increase power and possibly upsetting existing agreements. First, existing co-location or extension agreements, several of which were submitted in this proceeding, provide that Gulf and land carriers use the same formula and do not allow "one side or the other" to change agreed upon parameters for operating the facilities subject to the agreement. Thus, it is not clear how existing agreements could be "upset" by allowing Gulf carriers to use the same formula as land carriers, even for facilities not subject to an agreement. In any event, reducing the unauthorized capture of Gulf carriers' traffic is not any kind of "harm" that should be feared in adopting an equal signal strength rule -- a rule that applies to every cellular market in the country except the Gulf of Mexico.

[57] PetroCom made this argument in an ex parte letter filed with the FCC's Secretary on December 14, 2001. With the court's remand, it would be reasonable for PetroCom to understand that the water formula was not in force.

Moreover, agreements PetroCom has reached with land carriers are based on the land formula, a fact that recognizes that customers in the Gulf on boats have been using handset receivers more and more as compared with cellular phones using mast-mounted antennas.[58] The water formula and the data supporting it, first presented in 1992, are stale. Technology has changed. However, regardless of which formula is chosen, the most important concern here is that the same formula be applied to over water contours regardless of their source. PetroCom believes that having both land and Gulf carriers use the land formula is the most sensible choice.[59] That choice would require no licensee to "pull back" contours. It is a position that was shared by other carriers, including U.S. Cellular. However, in the alternative, PetroCom submits that the water formula should be used by both types of carriers if the land formula is not.

The *Gulf Cellular R&O* does not comply with Regulatory Flexibility Act requirements that the Commission analyze the adverse economic impact of proposed rules on small entities and consider alternatives that minimize that impact while achieving the agency's goals.[60] In particular, the Commission – after reversing its earlier decision and tentatively concluding that land carriers should be using the same formula for over water contours -- did not conduct an Initial Regulatory Flexibility Analysis that described the impact on the Gulf carriers of using the "two-formula approach" that allows land carriers to continue to use the land formula for such contours. The Commission's Final Regulatory Flexibility Analysis included in the *Gulf Cellular R&O* therefore is also flawed. It contains no description of the steps the agency has taken to minimize the significant economic impact on the Gulf carriers of continuing to allow land

[58] *See, e.g.*, Ex parte letter from PetroCom counsel to FCC Secretary, filed September 24, 2001 (noting extension agreement with land carrier based on 32 dbu contours).

[59] PetroCom proposed specific text for such a rule. Ex parte letter from PetroCom counsel to FCC Secretary, filed on November 6, 2001.

[60] 5 U.S.C.§601 et seq.; *See also* PetroCom's Ex Parte Submission of Revised Proposal As Alternative To Proposed Rules Pursuant To The Regulatory Flexibility Act, filed August 21, 2001.

carriers to use the land formula that gives them a stronger signal at the border than Gulf carriers have. Nor does it contain a statement addressing the factual record created in this proceeding and, in light of that record, why an equal signal strength rule, such as the one proposed by PetroCom and U.S. Cellular, was rejected as an alternative.[61]

PETROCOM'S CO-LOCATION APPLICATIONS SHOULD BE REINSTATED AND GRANTED

PetroCom also requests reconsideration of the dismissal of its co-location applications in the *Gulf Cellular R&O*.[62] Each of those applications was filed by PetroCom pursuant to the terms of agreements with land carriers to co-license sites on land in markets adjacent to the Gulf of Mexico. Each application included a copy of the agreement pursuant to which it was filed. These agreements were well documented throughout the proceeding that culminated in the *Gulf Cellular R&O*.[63] Describing PetroCom's co-location agreements in particular, the Commission emphasized that it wished to encourage, not discourage, the negotiation of such agreements.[64] It also stated that "nothing in its decisions were intended to modify or alter the effect" of existing agreements.[65] Dismissal of the captioned applications filed by PetroCom pursuant to its co-location agreements with land carriers therefore is contrary to what the Commission intended.[66]

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[61] *Gulf Cellular R&O* at Appendix D, ¶34.

[62] File Nos. 02590-CL-97; 02593-CL-97, 02594-CL-97; 02595-CL-97, 02596-CL-97; 02600-CL-P2-97, 02407-CL-P2-98. The dismissed applications were listed at Appendix B of the *Gulf Cellular R&O* and announced in *Public Notice*, Report No. 1080, released January 23, 2002. PetroCom filed a petition for reconsideration of the dismissals on February 22, 2002 within 30 days of the *Public Notice* release date.

[63] PetroCom provided copies of co-location agreements to WTB staff on February 14, 2001. The agreements were also described in PetroCom's March 1, 2001 ex parte submission (as well as in other filings it made) in the captioned dockets.

[64] *Gulf Cellular R&O* at ¶¶ 26-28.

[65] *Id.* at ¶ 33.

[66] The Commission included the captioned applications with other applications that were being dismissed as "Phase II" applications, or for having extensions into the Gulf. Unlike other applications in this group, PetroCom's applications were unopposed, filed with the consent of the land carrier, and submitted years prior to the *Gulf Cellular R&O* in accordance with then-existing rules. Moreover, the Commission exempted the Gulf of Mexico

Applying the new rules to dismiss these applications constitutes impermissible retroactivity.[67] Moreover, applications implementing the Coastal/Alltel co-location agreement appear not to have been dismissed by the *Gulf Cellular R&O* and, therefore, neither should applications implementing PetroCom's co-location agreements. PetroCom's applications, therefore, should be reinstated and granted.

THE COMMISSION SHOULD CLARIFY THE NEW RULES

The new rules give Gulf carriers the "exclusive right to provide service" in the GMEZ.[68] At the same time, the Commission re-adopted Section 22.911(a)(2), unaltered from the original rule that was vacated by the appeals court that continues to define a Gulf carrier's CGSA in terms of actual SAB contours using the water formula. Section 22.911 also states that the CGSA is "the area within which cellular systems are entitled to protection and within which adverse effects for the purpose of determining whether a petitioner has standing are recognized."[69] Together, the new Section 22.950 and the unchanged Section 22.911 could be misinterpreted to mean that a land carrier may serve the GMEZ as long as it does not intrude into the Gulf carrier's CGSA, i.e., its SAB contours.

That is not what the Commission intended. In the *Gulf Cellular R&O* it rejected its original proposal to allow de minimis extensions into the "unserved areas" of the GMSA Exclusive Zone in light of the ability of the land-based and Gulf carriers to enter into agreements

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Exclusive Zone, where PetroCom in any event has exclusive licensing rights (and where five of the seven captioned applications have extensions), from Phase II licensing procedures. *Gulf Cellular R&O*, ¶¶ 16, 28.

[67] *See, Landgraf v. USI Film Products*, 511 U.S. 244 (1994); *Chadmoore Comm. v. FCC*, 113 F. 3d 1195 (D.C. Cir 1996); *see also McElroy Electronics Corp. v. FCC*, 86 F.3d 248 (1996).

[68] *Gulf Cellular R&O*, Appendix C (Final Rule, 47 C.F.R.§22.950(a)(2)(b)). The numbering of this rule as shown in the *Gulf Cellular R&O* appears to be in error, and should be numbered as 47 C.F.R.§22.950(c).

[69] 47 C.F.R. §22.911.

regarding their operations.[70] Accordingly, the Commission should revise the CGSA definition of Section 22.911(a)(2) to the Coastal Zone (in which unserved area applications will be processed) to make clear that Section 22.950 means that a land carrier may not extend into any part of the GMEZ, served or unserved, without the Gulf carrier's consent. An alternative would be to clarify that the Gulf carrier's CGSA is co-terminous with the GMEZ. This revision should be implemented along with a switch to the land formula for calculating Gulf carrier's contours.[71] Failure to make these changes will undermine Gulf carriers' co-location agreements with land carriers who will have less incentive to reach such agreements if they believe the rules permit non-consensual extensions into "unserved" portions of the GMEZ. Such a result is directly contrary to the policies espoused by the Commission in the *Gulf Cellular R&O.*

THE COMMISSION SHOULD GRANDFATHER OPERATIONS

PetroCom submitted a proposal to grandfather the existing operating parameters of cellular systems operating in and near the Gulf.[72] Under this proposal, the operating parameters of such systems as of April 16, 1997 (the start date of the rulemaking), including all cross-boundary extensions, would be grandfathered. Grandfathering would continue for new or modified facilities to the extent that their 32 dbu contours remained within the originally grandfathered extensions. For sites operated pursuant to co-location agreements, extensions would be grandfathered for the term of those agreements, including renewals. The *Gulf Cellular R&O* materially erred by not addressing grandfathering, especially given the showing that the

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[70] *Gulf Cellular R&O*, ¶32.

[71] An approach to such revisions is illustrated by the proposed rule text, submitted by PetroCom on November 6, 2001, that eliminates the language from Section 22.911(a)(2) defining the Gulf Carrier's CGSA in terms of SAB contours based on the water formula, replacing it with a definition in terms of the coastline boundary while permitting Gulf carriers to use the land formula, thus implementing the PetroCom/US Cellular joint proposal. The same result could be accomplished by equating "CGSA" with "GMEZ." Alternatively, as argued above, the rules should require the land carriers to use the water formula for calculating over water contours.

[72] Ex parte letter from PetroCom counsel to FCC Secretary, filed October 26, 2001.

contour formula rule that was in place since the court's remand permitted Gulf carriers to engineer 39 dbu contours, not 28 dbu contours. The Commission should reconsider and adopt the grandfathering proposal.

CONCLUSION

For the reasons stated above, the Commission should reconsider the *Gulf Cellular R&O*. It should revise that decision and permit Gulf carriers to use the same land formula for calculating over water contours as land carriers use or, alternatively, require land and Gulf carriers to use the same water formula. It should reinstate and grant the applications PetroCom submitted pursuant to co-location agreements with land carriers. It should also clarify Section 22.950 to make clear that a land carrier may not have non-consensual extensions into any portion of the GMEZ, served or "unserved," without the Gulf carrier's consent. The Commission should also adopt grandfathering for the operating parameters of systems in and near the Gulf as of April 16, 1997.

Respectfully submitted,
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CERTIFICATE OF SERVICE

I, Richard S. Myers, hereby certify that, on this 3rd day of April 2002, I caused a copy of the foregoing "Petition For Partial Reconsideration" to be sent, by First Class U.S. mail, postage pre-paid, to the following:

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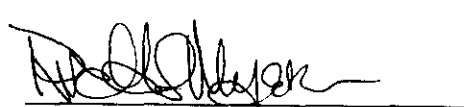

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